No. 299

In the Supreme Court of the United States

October Term, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

AVONDALE MILLS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. I, 131–135)[1] is reported at 242 F. 2d 669. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 60–83, 115–130) are reported at 115 NLRB 840.

[1] The record, as re-bound for this Court, consists of three parts: (1) the pleadings, Trial Examiner's intermediate report, Board decision and order, and proceedings in the court below; (2) excerpts from the transcript of testimony printed as an appendix to the Board's brief in the court below; (3) excerpts from respondent's appendix in the court below. References to these three parts will be designated "R. I," "R. II," and "R. III," respectively.

JURISDICTION

The court below entered its judgment (R. I, 135) on March 29, 1957, and denied a petition for rehearing on May 3, 1957 (R. I, 139). The petition for a writ of certiorari was granted on October 14, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

QUESTION PRESENTED

Whether a rule prohibiting employees from engaging in pro-union solicitation during working hours, otherwise valid under the tests enunciated by this Court, is invalidly applied if the employer himself is engaging in unlawful, coercive, anti-union solicitation during working hours.

STATEMENT

I. THE BOARD'S FINDINGS OF FACT

A. RESPONDENT COUNTERS A UNION CAMPAIGN BY INVOKING A RULE AGAINST PRO-UNION SOLICITATION DURING WORKING HOURS, AND BY THREATS OF REPRISAL FOR UNION ACTIVITY

In the fall of 1954, the Textile Workers of America, AFL–CIO, herein called the Union, began an organizational campaign at respondent's mills in Sylacauga, Pell City, and Alexander City, Alabama (R. I, 70–71, 74; II, 11–13). On November 10, 1954, the Union gave union membership cards to some 60 of respondent's employees working in two mills located in Sylacauga (*ibid.*).

Beginning November 11, the day after the distribution of union cards, respondent called a number of employees individually into the office of a management representative, and there read them the following statement (R. I, 116–117; II, 19–20, 91):

> It has come to our attention that you are attempting to solicit union membership in this

> plant during working hours, or while the employees that you are attempting to solicit are at work. This is a violation of plant rules and any future instances of this sort will result in prompt dismissal.

In each case, the individual thus summoned had allegedly been soliciting for the Union. Respondent did not publicize its antisolicitation rule to the employees as a group, and the employees had not been aware of it prior to the November 11 warning interviews (R. I, 117–118; II, 59–60, 19–20, 43–44, 76–77, 85–87, 109, 132, 135–136, 147). Thus, not only the employees specifically warned (R. II, 36, 44, 77, 87, 90, 101, 109, 118, 132, 136, 147), but other employees called as witnesses at the hearing (R. II, 82, 106, 139, 141, 142, 144), testified that they were never apprised of any rule against solicitation until after the start of the Union's campaign. Cathlene Sneed, an employee of 22 years' service with respondent, and Autrey McCoy, who had worked for respondent for 15 years, both testified that they had never known or heard of any rule against solicitation (R. II, 138, 139, 143–145). Only one supervisor, Gunter, testified that any such rule pre-dated the Union's campaign and he stated that he had never seen "a written rule, but it is an inferred rule" (R. I, 117, n. 2; II, 151). Only one employee, respondent's witness McCain, testified that he knew soliciting was against plant rules, stating that he had never "read the rules, but [had] heard the talk before" (R. I, 117; II, 155).

The warnings against solicitation were accompanied in several cases by other antiunion expressions. Thus

Superintendent Pasley, in the course of warning Fitzsimmons, told him that the Company would not stand for the Union's coming in, and could shut down if it did (R. I, 79; II, 134). Pasley similarly accompanied his warning to Epperson by adding that unionization of a nearby mill had resulted in a shutdown and blacklisting of the employees, who were not even able to sell their homes (R. I, 78; II, 90, 162). The day before Rich was warned against solicitation, Foreman Forbus inquired into Rich's union views and predicted that if the organizing drive succeeded the plant would close (R. I, 81–82; II, 18); and a few days after the warning, Foreman Gunter asked Rich not to solicit for the Union outside the plant (R. I, 82, 118; II, 21–22). In similar fashion, Foreman Phurrough, a few days after reading the no-solicitation warning to Jones, sent a personnel clerk to tell Jones to stop all union activity (R. I, 93–94, 118–119; II, 44–45), while the warning to Dupree followed shortly after he was told that respondent would close the mill rather than recognize the Union (R. I, 84–85; II, 107–109).

B. RESPONDENT, NOTWITHSTANDING ITS RULE AGAINST PRO-UNION SOLICITATION, ENGAGES THROUGH ITS SUPERVISORS IN ANTI-UNION SOLICITATION DURING WORKING HOURS

Although respondent had promulgated or revived a rule against campaigning for the Union during working hours, its supervisory personnel engaged in anti-union campaigning while the employees were at work, threatening employees with loss of benefits and with a shutdown of the plant if the Union succeeded in organizing it. Thus Supervisor Cabiness told employee Dupree, while the latter was at work in the

spinning room, that respondent "would never recognize the union * * * they would cut those frames up and sell them for junk before they would let the union come in" (R. I, 85; II, 107–108). Cabiness also told employee Price, in the tool room, that if the Union "came to Avondale Mills the mill would shut down" (R. I, 84; II, 98). Foreman Forbus told employee Rich, who was "running the creel job * * * at that time," that "If it goes union, this plant will shut down and we won't have any jobs" (R. I, 81–82; II, 18). In the same vein, Assistant Foreman Brooks told employee McCoy, who was "working at the time," that if the mill became unionized the employees would lose their "old age benefits, the hospital and the profit-sharing would be eliminated of course" (R. I, 87; II, 144).[2] While employee Connell was at work, Foreman Forbus asked him what he thought he would gain by joining the Union, and said that "the mill would probably shut down if it went union down there" (R. I, 76; II, 83–84). Employee Bass' supervisor asked her, while she was working, what she thought about the Union, and whether all her people belonged to it (R. I, 87; II, 140). As noted above, respondent also sent a personnel clerk to solicit employee Jones' withdrawal from the Union; this

[2] Foreman Brooks similarly told employee Sneed that "you know what you would lose if you were for the union, your hospital insurance and everything" (R. I, 86; II, 138), and he told employee Stephens that advent of the union would probably cause the mill to shut down, and would certainly result in the loss of existing insurance and medical benefits (R. I, 87; II, 76, 78). The record is not clear as to whether these statements were made during working hours.

solicitation likewise occurred while Jones was "on [his] job" (R. I, 93; II, 45).

C. RESPONDENT ENFORCES ITS RULE AGAINST PRO-UNION SOLICITATION BY DISCHARGING THREE EMPLOYEES

1. *John Rich.* On November 10, Foreman Forbus asked employee Rich, while the latter was at work, what he thought about the Union, indicated that he (Forbus) had heard about the union men in town, and then stated that: "If it goes union, this plant will shut down and we won't have any jobs" (R. I, 81–82; 88–89; II, 18). The following day, Rich was called to Foreman Gunter's office where, in the presence of Forbus, Gunter read to Rich the warning against solicitation quoted at pp. 3–4, *supra* (R. I, 89; II, 19–20).

On November 16, Foreman Gunter came to Rich and requested that he stop his distribution of cards outside the mill (R. I, 82, 118; II, 21–22). Rich replied that when outside of the gates he was "on [his] own" and would make no promises (*ibid.*). The next morning, Rich was called to the office of Foreman Forbus and asked to sign a confession that he had violated respondent's no-solicitation "rule" (R. I, 82; II, 22–23). According to respondent, Rich, while riding in the plant elevator, had asked the elevator man if he wanted a union (R. I, 90; III, 38–39). When Rich refused to sign the confession, Forbus said: "John, you are too old a man for this. You're going to be left out in the cold. You'll be left in a ditch. This mill is not going union and you won't have any job" (R. I, 82; II, 23). Rich was laid

off the same night, despite his denials that he had solicited for the Union (R. I, 90; II, 24–26). His employment was thereafter officially terminated after he had followed respondent's complaint procedure in an effort to get his job back (R. I, 90; II, 28–32).

2. *James Jones.* On November 12, Jones, a doffer in the Eva Jane Mill, solicited signatures for union cards among the spinners in the spinning room (R. I, 91; II, 44, 58). The next morning, he was called to the office of Foreman Phurrough. Phurrough, in the presence of Assistant Foreman Cabiness, read the warning against union solicitation after informing Jones he had been reported "working for the Union" (R. I, 91; II, 43). Jones had not previously been aware of any rule prohibiting such conduct (R. I, 121; II, 44).

On the night of November 17, Cleghorn, a personnel clerk and cousin of Jones, told Jones, while the latter was at work, that Foreman Phurrough had requested him (Cleghorn) to ask Jones "to stop working for the Union" (R. I, 121; II, 45, 69). Cleghorn told Jones that mills in a number of cities had shut down because of the Union, that people were going hungry and barefoot, and that "If this mill goes union, we certainly will shut it down as we will not operate under a union contract" (R. I, 94, 121; II, 45). Later, on the same shift, employee Benny Nicholson came to Jones at work and asked for a union card (R. I, 92–93, 121; II, 62–63). Jones replied that he had been warned about passing out cards on the job but that he would get one for Nicholson and give it to him outside the gate, the next morning after work (*ibid.*).

Jones never gave a card to Nicholson, but Nicholson obtained a card from employee Jimmie Dupree, who got it from Jones' car (R. I, 92–93, 121; II, 63–64, 110–111).[1] Nicholson turned the card over to Foreman Phurrough the next morning (R. I, 121; II, 171–172).

On November 18, Jones was called to the office of Superintendent Phurrough, who told Jones he had been reported soliciting again (R. I, 82–83, 121; II, 46). Jones denied having solicited anyone (*ibid.*). Phurrough then told Jones he was going to have to lay him off for 30 days, and he handed Jones a paper with his time in full (R. I, 82; II, 47). Jones asked whom he would have to see to prove he had not solicited, and Phurrough told Jones he did not know (R. I, 83, 122; II, 47). Later, the same shift, when Phurrough came to Jones' machine, Jones again asked whom he could see to prove that he had not solicited and Phurrough, after repeating that he did not know, added that Jones could see Halstead, the union organizer (R. I, 83, 122; II, 47–48).

Later, the same morning, Jones returned to the office of Superintendent Callaway to get his pay (R. I, 83, 122; II, 49–50). Callaway asked Jones what the Union had promised him, whether it had shown him a contract, and whether he had heard about other mills shutting down and people going hungry and barefoot. (*ibid.*). Callaway then asked Jones: "Well, why don't you let other people do what they want to do and you do what you want to do, don't go

[1] Nicholson had also asked Dupree for a card (R. I, 121, n. 10; II, 110).

around trying to get them to sign the union cards" (*ibid.*). Thereafter, Jones appealed his layoff through respondent's complaint procedure (R. I, 83, 122; II, 51). In the course of this appeal, General Superintendent Turner asked Jones what made him "want to work for the union * * * and he said he just couldn't see what would make a boy come from a good family like I did want to work for such a mess as the Union * * * then he told me that way back yonder some people in Alex City got involved in the same type of business and the families was separated from each other * * * and then he asked me if I was satisfied on the job" (R. I, 83, 122; II, 55). When Jones' complaint reached respondent's president Smith, he likewise asked what made Jones work for the Union and also described the shutting down of other mills (R. I, 84, 122; II, 56). Jones was not reinstated (R. II, 189).

3. *Calvin Parker.* Parker had been in respondent's employ at various intervals since 1942, until his discharge in November 1954 (R. I, 94; II, 112). Accepting the testimony of respondent's witnesses, the Trial Examiner and the Board found that Parker was discharged for asking an employee if he would sign a union card and for telling him why the Union would be good for the Company; this solicitation took place at a time when Parker had completed his work for the day and the other employee had just begun (R. I, 96–97; II, 155–159; III, 34–36).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that respondent violated Section 8(a) (1) of the Act by interrogating employees concerning their union membership, views, and activities; threatening them with loss of benefits, loss of employment and a plant shutdown, if the Union organized its mills; and soliciting employees to withdraw from the Union (R. I, 100, 116–117). The Board further found that respondent "was prompted to invoke the no-solicitation rule by a desire to prevent unionization of its employees rather than by consideration of plant production and efficiency," noting that "anti-union solicitation was not made an offense," and that respondent's supervisors engaged in coercive and unlawful solicitation during working hours by threatening employees with reprisal for union activities and interrogating them concerning their union membership and sympathies (R. I, 118, 119, 120). Having thus found that respondent's no-solicitation rule was discriminatorily invoked and applied, the Board concluded that the discharges of Jones, Rich, and Parker, allegedly for violating the rule, were violative of Section 8 (a) (3) and (1) of the Act (R. 120). Finally, the Board concluded that even if the no-solicitation rule had been validly invoked and applied, the evidence with respect to Jones established that he was unlawfully discharged because of his adherence to the Union, and not because of his alleged violation of the rule (R. I, 121–123).

The Board accordingly ordered respondent to cease and desist from violating Sections 8 (a) (1) and (3), to reinstate the three dischargees with back pay, and to post appropriate notices (R. I, 125–130).

III. THE DECISION OF THE COURT BELOW

Noting that respondent did not challenge the Board's findings with respect to the coercive conduct of respondent's supervisors, the court below enforced the Board's order insofar as it rested upon respondent's unlawful threats and interrogation of employees (R. I, 133). The court likewise agreed with the Board that respondent had unlawfully discharged Jones for union activity, and enforced the order insofar as it directed his reinstatement with back pay (R. I, 134). But, notwithstanding the coercive and unlawful anti-union solicitation by the supervisors during working hours, the court below held that violation of the no-solicitation rule by employees furnished the Company a valid ground for their discharge (R. I, 133–134). The court conceded that an "otherwise valid no-solicitation rule [i. e., one which prohibits union solicitation during working hours] cannot be invoked or applied for a discriminatory anti-union purpose" (R. I, 133–134). It concluded, however, that "The evidence fails to establish that any solicitation in violation of the rule had ever been permitted. Nor does the fact alone that the company was opposed to the union, as was its lawful right, furnish substantial evidence of an unlawful and discriminatory purpose in invoking and applying its no-solicitation rule" (R. I, 134). The court accordingly set

aside the Board's order insofar as it directed respondent to reinstate Rich and Parker with back pay and to cease discriminatorily enforcing the no-solicitation rule (R. I, 135).

ARGUMENT

This case is to be argued directly following *National Labor Relations Board* v. *United Steelworkers of America, CIO, and Nutone, Inc.*, No. 81, this Term. In that case, the Court of Appeals for the District of Columbia Circuit held, contrary to the Board, that an employer who distributed *lawful, non-coercive* anti-union literature during working hours could not lawfully prohibit employees from disseminating pro-union literature under the same conditions. That court reasoned that the employer's actions vitiated the justification for an otherwise valid no-distribution rule. Should this Court sustain the District of Columbia Circuit in that case, this case must be reversed *a fortiori*, for here the Company accompanied its no-solicitation rule by engaging, through its foremen, in *unlawful, coercive* anti-union solicitation. We shall therefore assume, for purposes of this brief, that the Court will reject the view of the District of Columbia Circuit and will hold, in accord with the views advanced by the Board in No. 81, that the employer in that case was privileged to forbid the dissemination of union literature during working hours. On that assumption, we nonetheless believe that the decision in this case should be reversed, as the conduct of the employer here establishes discriminatory motivation in the invocation and application of the no-solicitation rule.

THE DECISION MADE BY THE BOARD IN THE INSTANT CASE IS A PROPER APPLICATION OF THE PRINCIPLES GOVERNING EMPLOYEE SOLICITATION DURING WORKING HOURS. THE CONTRARY RULING OF THE COURT BELOW SHOULD BE REVERSED

As is developed more fully in the Board's brief in No. 81, pp. 16–24,[1] the right guaranteed employees by Section 7 of the Act to engage in union solicitation occasionally conflicts with the competing right of employers to unimpeded production during working hours. As this Court has recognized, when these rights conflict, a balance must be struck giving as much scope as possible to both the competing interests, and it is the Board's duty, subject to court review, to evolve the principles, consistent with the statute, by which this balance will be struck. *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 797–798; *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U. S. 105, 111–113; *National Labor Relations Board v. Stowe Spinning Co.*, 336 U. S. 226, 231.

The Board expressed the principles which guide it in *Peyton Packing Co., Inc.*, 49 N. L. R. B. 828, 843–844, cited with approval in the *Republic* case, 324 U. S. at 803–804. With respect to "no-solicitation" rules, the Board there stated (49 N. L. R. B. at 843, quoted at 324 U. S. 803, n. 10):

> Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid *in the absence*

[1] Copies of that brief have been served upon respondent.

of evidence that it was adopted for a discriminatory purpose. [Emphasis supplied.]

In short, the Board making an adjustment between the competing interests and rights, permits an employer to limit the Section 7 right of the employees to engage in solicitation where the abridgement is not for the purpose of interfering with union activities (although it necessarily has that incidental effect), but is solely for the purpose of assuring the employer of the employees' full attention to work during working hours. Where, however, the employer's prohibition of union solicitation during working hours springs not from a concern over undisturbed production, but from a desire to discriminate against and thwart union activity, the no-solicitation rule loses its protected character as a legitimate means of furthering production and becomes an unwarranted invasion of the employees' statutory rights.

This analysis, first enunciated in the *Peyton* case, has met with uniform judicial approval. This Court has indicated that where the invocation of restrictive rules flows not from the employer's right to protect legitimate interests, but from his desire to obstruct employee self-organization, the immunity otherwise accorded him is forfeited. *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 230, 233; see, also, *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 111, n. 4. The courts of appeals have likewise held that where a rule against solicitation, even though reasonable on its face, is invoked out of a desire to impede self-organization rather than for legitimate business reasons, the rule

is invalid and discharges for its violation are unlawful. *National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. 2d 410 (C. A. 10); *Carter Carburetor Corp* v. *National Labor Relations Board*, 140 F. 2d 714, 716–717 (C. A. 8); *National Labor Relations Board* v. *William Davies Co.*, 135 F. 2d 179, 181 (C. A. 7), certiorari denied, 320 U. S. 770. Finally, in *Babcock & Wilcox*, this Court summarized the law by stating that the right of employees to discuss self-organization on plant premises is not to be restricted save where the employer affirmatively establishes that the restriction is necessary to protect legitimate business interests. 351 U. S. at 113.

The Board, applying these principles in the instant case, concluded that respondent "was prompted to invoke the no-solicitation rule by a desire to prevent unionization of its employees rather than by consideration of plant production and efficiency" (R. I, 119).[5] The record manifestly supports this finding. Respondent invoked the rule at the outset of the union campaign, warned only pro-union employees against solicitation, and accompanied the warnings with threats to close the mill if the Union were successful. This alone would indicate that the employer's reason for prohibiting solicitation was not a concern for plant efficiency but hostility to the Union's attempt to organize.

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[5] The trial examiner's contrary finding (R. I, 99) rests not on any question of credibility but solely on his conclusions from the testimony in the record. Under these circumstances the Board's findings, if supported by the record, should be sustained. *Federal Communications Comm.* v. *Allentown Broadcasting Corp.*, 349 U. S. 358, 364.

Conclusive evidence that the no-solicitation rule was discriminatorily invoked to impede union organization is found in respondent's own resort to coercive anti-union solicitation during working hours. As described above, pp. 5–7, respondent's supervisors repeatedly interrupted employees at their work to discuss the Union's efforts to organize, and solicited employees to abandon the Union by threatening them with loss of benefits if they did not. If the employer's concern in promulgating a no-solicitation rule was the valid one that working time is for work, he would not utilize the same working time to engage in coercive anti-union solicitation. The impact on production of respondent's coercive anti-union solicitation (pp. 5–7, *supra*) was at least as great as the impact of the alleged solicitations by Jones, Rich, and Parker (pp. 7, 8, 10, *supra*). When an employer with a no-solicitation rule engages in such coercive solicitation during working hours, he demonstrates that his real objective in invoking the rule is not the lawful one of promoting production, but the unlawful one of impeding union organization. The no-solicitation rule discriminatorily enforced by this employer does not achieve a balance between two legitimate competing interests, but, instead, infringes on the employees' statutory rights solely for the purpose of accomplishing the infringement.[8]

[8] Unlike *VaTran, No.* 81, there can be no question here as to the impact of Section 8 (c), for that Section is in terms limited to the situation where the employer's expression of views "contains no threat of reprisal or force or promise of benefit."

Having established that respondent's no-solicitation rule was discriminatorily invoked, and was intended not to safeguard production but to thwart the exercise of Section 7 rights, the Board properly held the rule invalid. It follows that employees who were engaging in pro-union solicitation were engaging in an activity protected by Section 7 and not forbidden by any valid rule. *Babcock & Wilcox*, 351 U. S. at 112; *Republic Aviation*, 324 U. S. at 797–798. Their discharge for such activity was therefore violative of the Act. *Republic Aviation*, 324 U. S. at 805; *Denver Tent & Awning*, 138 F. 2d at 411; *Carter Carburetor*, 140 F. 2d at 717; see, also, *National Labor Relations Board* v. *Peyton Packing Co.*, 142 F. 2d 1009, 1010 (C. A. 5).

The court below conceded that an "otherwise valid no-solicitation rule * * * cannot be invoked or applied for a discriminatory purpose." It concluded, however, that since the evidence failed to establish that "any solicitation in violation of the rule had ever been permitted," the record lacked "substantial evidence of an unlawful and discriminatory purpose in invoking and applying [the] no-solicitation rule" (R. I, 133–134). If the court's factual premise had any support in the record, then the differences between the Board and the court would involve no more than a mere disagreement between the two tribunals in their appraisal of conflicting evidence. But "the facts are to the contrary * * *." *National Labor Relations Board* v. *Warren Co.*, 350 U. S. 107, 110. As the court below itself recognized, respondent violated Section 8 (a) (1) of the Act by the coercive anti-union conduct of its supervisors. Much of this

unlawful anti-union conduct occurred during working hours when respondent's rules prohibited pro-union solicitation. What the court below failed to recognize is that when an employer "appeals" to employees to abandon their union, threatening them with loss of benefits if they do not, he is engaging in "anti-union solicitation," just as a union protagonist urging employees to join, and suggesting benefits if they do, is engaging in pro-union solicitation.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the case remanded with directions to enter a decree enforcing the order of the Board.

Respectfully submitted.

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